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Supreme Court of the United States

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THE CITY OF LOS ANGELES,
Petitioner,

v.

ALAMEDA BOOKS, INC., AND HIGHLAND BOOKS, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the First Amendment requires a municipality to compile evidence of the adverse secondary effects of specific adult business combinations prior to enacting content-neutral zoning ordinances designed to ameliorate secondary effects.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.[1] The subject of this case—the evidentiary burden that a state or local government must meet in order to enact an ordinance zoning adult business uses—is of utmost importance to *amici* and their members.[2]

In the past 30 years, the regulation of adult businesses has become an issue of great prominence for municipalities and States. This is because "[t]he number of adult businesses and the quantity of adult entertainment on the market has increased explosively over the past three decades." Jules B. Gerard, *Local Regulation of Adult Businesses: 2001 Edition* § 1.02, at 2 (2000). Adult businesses "now appear in virtually all communities." *Id.* at v.

Municipalities, in particular, have a compelling need to protect their citizens from the adverse secondary effects that so often flow from the operation of these businesses, with the consequent "'harmful effect'" on neighborhoods and their "'contribut[ion] to neighborhood blight.'" *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986) (quoting

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent filed with the Clerk of the Court. This brief was not authored in whole or part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution towards its preparation or submission.

[2] Although local governments are responsible for most regulation of adult entertainment, some States regulate in this area. *See, e.g.*, Del. Code Ann. tit. 24, §§ 1601-1635 (2001); *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 131-39 (3d Cir. 1993) (upholding Del. statute limiting hours of operation); N.C. Gen. Stat. §§ 14-202.10—14-202.12; *Hart Book Stores, Inc. v. Edmisten*, 612 F.3d 821, 826-30 (4th Cir. 1979) (upholding N.C. Gen. Stat. § 14-202.11, which prohibits multiple adult uses in a single building).

Northend Cinema, Inc. v. City of Seattle, 585 P.2d 1153, 1156 (Wash. 1978)). Zoning ordinances, because they do not ban speech, "currently are the most popular form of regulation of adult entertainment." Gerard, *Adult Businesses* at vi.

The court below invalidated a mere clarification of a then-recently enacted zoning ordinance designed to ameliorate the secondary effects of adult businesses by dispersing them. Its holding stands as a major obstacle to efforts by municipalities to regulate adult businesses in a fair and even-handed way through the use of the zoning power. Because of the importance of the issue presented to *amici* and their members, *amici* respectfully submit this brief to assist the Court in its resolution of this case.

STATEMENT OF THE CASE

A. History of the Los Angeles Adult Entertainment Zoning Ordinance, L.A.M.C. § 12.70

The City of Los Angeles ("the City") has regulated businesses engaged in "adult uses" for almost a century. "[I]n 1915, the prevalence of sex evils arising out of massage parlors" led the City Council to enact an ordinance banning persons of one sex from administering massages to persons of the opposite sex. *See In re Maki*, 133 P.2d 64, 69 (Cal. Ct. App. 1943) (citing Los Angeles Municipal Code § 27.03) ("L.A.M.C."). The purpose of the ordinance was to "safeguard against the deterioration of the social life of the community." *Id.*

Beginning in the late 1960's, the City experienced a burgeoning of sex-related establishments, including nude bars, sexual scam joints, arcades, massage parlors, newsracks, adult theaters, and bookstores. J.A. 70 (Study of Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles, June 1977) ("Los Angeles Study"); *id.* at 179 (Los Angeles Police Department statistical review). *Cf. California v. LaRue*, 409 U.S. 109, 110-11 (1972)

(documenting secondary effects in California in late 1960's resulting from increase in adult bars, which included increases in prostitution, indecent exposure, rape, and attempted rape).

The concerns of citizens and elected officials of Los Angeles led to numerous actions by the City Council to deal with the problems resulting from this proliferation of adult entertainment businesses. *See* J.A. 72-75 (summary of City Council actions relating to adult entertainment between March 1970 and May 1977).

At the same time, the City Police Department prepared a report, "The Impact of Sex Oriented Businesses on the Police Problem in the City of Los Angeles" ("Police Report").[3] The introduction to the Police Report explained that "[d]uring the past several years, the City . . . has been confronted with the problem of proliferating sex oriented Adult Entertainment Establishments," a type of business that "includes, but is not limited to, massage parlors, adult movie theaters and arcades, adult bookstores, and other sexually oriented enterprises." J.A. 173. The Police Report stated that "these businesses may have had blighting effects on both business and residential communities." *Id.* at 173-74.

The Police Report focused on the City's Hollywood area "because the problem is most prevalent there due to the clustering and proliferation of the sex oriented Adult Entertainment Establishments during the past seven years." *Id.* at 174. The report found that "Part I" crimes—"those criminal acts which most severely effect their victims . . . includ[ing] homicide, rape, aggravated assault, robbery, burglary, larceny, and vehicle theft," J.A. 175—had, during the period 1969-75, increased in Hollywood at almost twice

[3] The introduction and the first section of the Police Report, which discusses crime statistics in the Hollywood area, are reproduced at J.A. 173-83. The full report is part of the record in the Ninth Circuit. *See* Appellant's Excerpts of Record, No. 98-56200, Vol. 3, at 658-852.

the rate as in the City as a whole. *Id.* Even more striking was the increase in prostitution and pandering in Hollywood: arrests for prostitution increased by 372.3% from 1969 to 1975, compared to a 24.5% increase in the City as a whole. J.A. 176. Arrests for pandering increased by 475% in Hollywood and 133.3% in the City during the same period. *Id.*

The concluding paragraph of the Police Report contains a chilling summary of the adverse secondary effects of the massive proliferation of adult businesses in Hollywood during the period 1969-75:

> This survey reflects a seven-year span during which . . . the Adult Entertainment Establishments in the Hollywood Area proliferated from a mere 11 establishments to an astonishing . . . 88 such locations. The overall deleterious effect to the entire community is evident in the statistics provided. The overwhelming increase in prostitution, robberies, assaults, thefts, and the proportionate growth in police personnel deployed throughout Hollywood, are all representative of the blighting results that the clustering of Adult Entertainment Establishments has on the entire community. These adverse social effects not only infect the environs immediately adjacent to the parlors but create a malignant atmosphere in which crime spreads to epidemic proportions.

J.A. 177.

On January 12, 1977, the City Council directed the City Planning Department "to conduct a comprehensive study, with the assistance of the Police Department, City Attorney and other appropriate City agencies, to determine whether and to what extent the concentration of . . . adult entertainment businesses has a blighting and degrading effect upon the neighborhoods in which they are situated." Pet. App. 60a (Ordinance No. 151294, adopted July 18, 1978).[4]

[4] The complete Los Angeles Study is found at J.A. 35-162.

The 1977 Los Angeles Study was based on the Police Report discussed above, analyses of property assessments, public meetings, questionnaires, and census data. *See* J.A. 36. The Study also analyzed zoning ordinances enacted in other large cities such as Boston, which zoned for the concentration of adult businesses into a single pre-existing "Combat Zone," J.A. 55-57, and Detroit, which had zoned for their dispersal. *Id.* at 57.[5]

The Los Angeles Study recommended that the City adopt a "dispersal type" of ordinance for the zoning of adult businesses. *Id.* at 40. It recommended, however, that "such an ordinance should be designed for specific application in the City . . . rather than the direct adoption of the Detroit model." *Id.* at 41. As a result, the zoning ordinance adopted by the City was more favorable to adult businesses than the Detroit ordinance in at least one important respect. Unlike the Detroit ordinance, which prohibited 11 different "adult uses" from being located "within 500 feet of any area zoned for residential use," the Los Angeles ordinance does not contain any prohibition concerning proximity to residential areas.[6] *Compare Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 52 & nn. 2, 3 (1976) (describing Detroit dispersal ordinance) *with* Pet. App. 67a (L.A.M.C. § 12.70.C)

[5] The Los Angeles Study also examined the adoption by a number of other cities, "spurred" by "[t]he success of the Detroit ordinance," J.A. 58, of the Detroit dispersal approach. The dispersal ordinances adopted by other cities are summarized in the Study at J.A. 61-63. The Los Angeles Study concluded that "[w]hile several major cities have adopted ordinances similar to the Detroit ordinance, no other major city has, to our knowledge, adopted a Boston-type ordinance." *Id.* at 38.

[6] As the Los Angeles Study explained, because of the extensive use of commercial "strips" throughout the City, adopting the residential restriction employed by Detroit would "limit the potential locations for such businesses rather severely." J.A. 40.

The Los Angeles ordinance also contained an amortization period, another protective provision for adult businesses. *See* Pet. App. 67a-68a.

(establishment of adult business prohibited "within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park").

On July 18, 1978, the City Council enacted, and the Mayor signed into law, Ordinance 151294, which added § 12.70, "Adult Entertainment Zoning," to the City Code. Pet. App. 60a-61a; 69a. The ordinance contained numerous findings by the City Council, including the "growing concern on the part of public officials and residents . . . regarding the appearance of a blighting and degrading effect upon certain neighborhoods . . . from the concentration of sex-oriented, adult entertainment businesses." *Id.* at 60a. The dispersal ordinance was therefore adopted "in order to preserve the public health, peace, safety, and general welfare by regulating adult entertainment businesses in such a manner as to prevent their further concentration and the continued erosion of the character of affected neighborhoods of the City." *Id.* at 61a.

The definitional subsection of the ordinance, § 12.70.B, contained provisions identifying a variety of separate adult uses subject to the ordinance, including "Adult Arcade," *id.* at 62a (§ 12.70.B.1), "Adult Bookstore," *id.* (§ 12.70.B.2), and "Adult Theater." *Id.* at 63a (§ 12.70.B.5). The definition subsection was followed by the prohibitory section, § 12.70.C, which provided:

> PROHIBITION. No person shall cause or permit the establishment, substantial enlargement, or transfer of ownership or control of an Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theater, Massage Parlor or Sexual Encounter Establishment *within 1,000 feet of another such business* or within 500 feet of any religious institution, school or public park within the City of Los Angeles.

Id. at 67a (emphasis added). The language of § 12.70.C, taken together with definitions of the separate terms "Adult Arcade" in § 12.70.B.1 and "Adult Bookstore" in § 12.70.B.2, expressly prohibited the operation of an adult

bookstore *within 1,000 feet* of an adult video arcade. *See id.* at 62a, 67a. The plain language of these provisions thus necessarily prohibited the operation of an "Adult Arcade" *in the same building* as an "Adult Bookstore."

The ordinance, however, also contained a subsection entitled "Measurement of Distance." *Id.* at 67a (§ 12.70.D). This subsection provided guidance for dispersal of adult uses, stating that "[t]he distance between any two adult entertainment businesses shall be measured in a straight line, without regard to intervening structures, from *the closest exterior structural wall of each business*." *Id.* (emphasis added).

Despite the plain language of §§ 12.70.B.1, B.2, and C, which prohibited the operation of an adult arcade within 1000 feet of an adult bookstore, the highlighted language in the measurement of distance subsection led the City Department of Building and Safety to read the ordinance in conflict with the City Council's express intent that bookstores and arcades be separated by at least 1,000 feet. According to a report prepared by the City Planning Department at the request of the City Council's Planning and Environment Committee, "an ambiguity in the present language [of § 12.70.D] . . . has resulted in the Department of Building and Safety interpreting [the distance] provisions in a manner which permits a combination of adult businesses to be established within the exterior structural walls of a single building at one location." J.A. 26.

Once aware of the Building Department's erroneous reading of § 12.70.D, the City Council acted to ensure the effectuation of its intent, as expressed in § 12.70.C, to separate adult uses by the prescribed distances. *See* discussion *supra* at 6-7. First, it enacted a temporary moratorium ordinance, effective March 16, 1982, "prohibiting the establishment of more than one adult entertainment business within the same building or portion thereof." J.A.

26.[7] In March 1983, the Council followed the moratorium with the permanent legislation that is the subject of this case—a zoning prohibition of multiple adult uses within a single building. Pet. App. 70a-75a. Among other provisions, the 1983 ordinance added subsection B.17 to the definitional

[7] The 1982 moratorium ordinance was introduced by a motion made in the City Council on January 20, 1982. The motion noted the "concern on the part of public officials and residents of the City . . . regarding the adverse impacts which result from the continued concentration of adult entertainment businesses." Appellant's Excerpts of Record in the Court of Appeals, No. 98-56200, Vol. 2, at 321. The motion noted that the City had already conducted an extensive study of "whether and to what extent the concentration of such adult entertainment businesses has a blighting and degrading effect upon the neighborhoods in which they are situated." *Id.*

The January 1982 motion specifically noted "a number of instances in which two or more adult entertainment business[es] are being established or maintained in the same building, and [that] the concentration of adult entertainment businesses at a single location may tend to have an adverse impact on the neighborhood in which they are located and *is contrary to the dispersal approach taken by the City in enacting [§ 12.70].*" *Id.* (emphasis added).

This motion led the City Planning Department and the City Attorney to prepare a moratorium ordinance "to prohibit more than one adult entertainment business in a single building on one site." *Id.* at 295. The Planning Department Report of March 4, 1982, drafted in response to the City Council motion of January 20, noted "staff's understanding that the actual intent of the [City] Council in enacting the existing adult entertainment zoning regulations in 1978 was not to permit more than one adult business at one location in a single building." *Id.* The draft moratorium ordinance was also submitted to the Department of Building and Safety, whose misconstruction of the 1978 ordinance had led to the need for legislative clarification. *Id.* at 307. The General Manager of the Building and Safety Department stated that he had "no objection to the Draft." *Id.*

section, § 12.70.B,[8] and a clarifying sentence to the prohibition section, § 12.70.C.[9] *See* Pet. App. 70a-71a.

The 1983 ordinance was specifically designated "[a]n ordinance amending Section 12.70 . . . *to clarify its provisions*." Pet. App. 70a (emphasis added). Section 6, the Statement of Purpose, set out in detail the rationale for the clarification:

> There is concern on the part of public officials and residents of the City of Los Angeles regarding the adverse impacts which result from the continued concentration of adult entertainment business. Based upon this concern, the . . . City Council in 1977 instructed the City Planning Department to conduct a comprehensive study . . . to determine whether and to what extent the concentration of such adult entertainment businesses has a blighting and degrading effect upon the neighborhoods in which they are situated. . . .
>
> . . . .
>
> [Despite the enactment of § 12.70 in July 1978] there have been a number of instances in which *two or more* adult entertainment business[es] have been established or maintained at the same location or operated as a single commercial enterprise. This concentration of adult entertainment businesses tends to have an adverse impact on the neighborhood in which they are located

[8] Subsection B.17 specified that each of the separate adult uses identified in the Definitions section "shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." Pet. App. 71a.

[9] The new language in § 12.70.C provided: "[N]o person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure, or portion thereof, or the increase in floor area of any adult entertainment business in any building, structure or portion thereof containing another adult entertainment business." Pet. App. 71a.

> and is *contrary to the dispersal approach taken by the City in enacting the Adult Entertainment Ordinance.*
>
> The purpose of this ordinance is *to clarify existing provisions of the Adult Entertainment Ordinance.* In enacting this ordinance in 1978, the City Council *did not intend to permit the establishment of more than one adult business in the same building or at the same location.* This ordinance will clarify Council's intent in that regard. . . .

Pet. App. 74a-75a (emphasis added).

B. Procedural History

This action began after a City inspector determined that respondent Alameda Books, Inc., "was operating both an adult bookstore and an adult arcade in the same building" in violation of § 12.70.C. Pet. App. 5a. Respondents Alameda and Highland Books, Inc., another adult business that operated an adult bookstore and video arcade "in the same commercial space within a single building," Pet. App. 41a (internal quotation and citation omitted), then commenced this action under 42 U.S.C. § 1983. Alameda and Highland sought declaratory and injunctive relief to prevent the enforcement of § 12.70.C. *Id.* at 5a.

The evidence relied upon by Alameda and Highland in support of their prayer for relief included declarations of their attorney, G. Randall Garrou, and their president, Steven Wiener. In one of his declarations, Wiener testified that operating a "multiple use" adult store would result in substantially increased retail traffic. "Based upon my many years of managing the operation of adult bookstore businesses," he testified,

> I have . . . developed substantial expertise in understanding the economics of this type of business. It is my opinion that an adult bookstore has a significantly greater chance of succeeding and remaining in operation if, as a part of its business, it operates an adult arcade.

> Similarly, it is my opinion that an adult arcade has a significantly greater chance of succeeding and remaining in operation if such business operates within an adult bookstore.

J.A. 230.[10]

The district court initially denied the parties' cross-motions for summary judgment and set the matter for trial. Pet. 8. Thereafter, the court reconsidered its ruling and granted Alameda and Highland's motion for summary judgment on their First Amendment claim. *Id.* at 9. The court rejected the City's reliance on *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and held that Ninth Circuit precedent required it to grant the plaintiffs' motion for summary judgment. Pet. App. 33a. The court explained that adopting the City's *Renton* arguments "would allow a municipality to regulate speech based on an assertion of harmful secondary effects *without any showing that such secondary effects exist.* Ninth Circuit precedents following *Renton* require a greater showing that *secondary effects actually exist.*" *Id.* (citing *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987)) (emphasis added).

The City appealed the judgment to the Ninth Circuit, which affirmed. Pet. App. 3a. The court of appeals essentially

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[10] On his lawyers' instructions, Wiener declined to address in his declaration "the entirely separate proposition of whether either [a bookstore or a video arcade] *could* in fact theoretically survive except as operated in tandem with the other." J.A. 230. In another declaration, however, Wiener testified that Highland Books "was issued a picture arcade police permit" in January 1987. J.A. 20. From that time until June 1991, "the only 'adult' type of business use at Highland Books was its picture arcade," although Highland also sold "non-adult" items during the same period. *Id.*

The fact that Highland was able to operate a single adult use—an adult arcade—for four and a half years appears to contradict Wiener's later assertion that the City's "only conceivable purpose [for enacting the challenged amendment to § 12.70] would appear to be the attempted destruction of the adult arcade industry." *Id.* at 231-32.

adopted the district court's reasoning that Ninth Circuit precedents, such as *Tollis* and *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000), place a heavier evidentiary burden on States and local governments to justify time, place, and manner regulations of adult businesses than do this Court's precedents. The court cited *Renton* and made one reference to *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). *See* Pet. App. 17a n.7.[11] The court grounded its judgment, however, on its own case law—and on its own exacting evidentiary standard.

The Ninth Circuit began its analysis by characterizing the City's governmental interest solely as "reducing crime in its neighborhoods." Pet. App. 11. *But see id.* at 61a (legislative purposes of § 12.70 are "preserv[ing] the public health, peace, safety, and general welfare . . . [and preventing] the continued erosion of the character of affected neighborhoods"); *see also Renton*, 475 U.S. at 48 (Renton's governmental interests in regulating adult businesses were "to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life'") (quoting Renton ordinance); *Erie*, 529 U.S. at 291 (plurality opinion) (Erie's interests in regulating adult

[11] In footnote 7 of its opinion, the court of appeals observed that the City of Erie, which sought to limit the degree of nudity permissible in an adult bar, "could," in this Court's view, "reasonably rely on the evidentiary foundation set forth in *Renton* and [*Young*]", both of which involved the zoning of adult movie theaters. This was, the court below reasoned, because the nude dancing that was the subject of regulation in *Erie* "was 'of the same character as the adult entertainment at issue'" in *Renton* and *Young*. Pet. App. 17a n.7 (quoting *Erie*, 529 U.S. at 296-97).

The court declined to apply that reasoning in this case, however, paradoxically explaining that "[f]or the purposes of the secondary effects identified in the Los Angeles Study, a solitary bookstore/arcade combination is *hardly of the 'same character'* as a grouping of multiple business establishments in a given geographical area." *Id.* (emphasis added).

businesses addressed "the impacts on public health, safety, and welfare, which we have previously recognized are 'caused by the presence of even one such' establishment.") (quoting *Renton*, 475 U.S. at 50).

The court of appeals then reaffirmed its *Tollis* standard, in which it "established a predicate evidentiary requirement that must be met before we will defer to the judgments of legislative bodies enacting content-neutral time, place, or manner regulations." Pet. App. 14a. The court acknowledged that the 1977 Los Angeles Study found that increased crime results from "concentrations of adult businesses." *Id.* at 11a; *see also id.* at 3a. The court nonetheless held that Los Angeles' multiple use ordinance was invalid because the City had "presented no evidence that a combination adult bookstore/arcade produces any of the harmful secondary effects identified in the Study." *Id.* at 15a.

The court of appeals explained that "[t]he Los Angeles Study examined concentrations of multiple adult business establishments; it did not study the impact of individual establishments in any form, whether as solitary units or as part of the concentration of businesses." *Id.* at 18a. The court did not give any weight to the possibility that concentrations of adult businesses might very well take the form of adult department stores. *Cf. Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 828 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980) (upholding state "multiple use" prohibition on the ground that "[t]he legislature could reasonably have determined that the development of the 'total, under one roof' approach to the marketing of sexually explicit materials and devices tended to produce secondary effects destructive of the general quality of life in the neighborhood").

In the concluding portion of its opinion, the court of appeals made explicit what had thus far been merely implicit—that the evidentiary burden in the States that comprise the Ninth Circuit is more exacting than the standard

articulated by this Court in *Renton* and in the *Erie* plurality opinion.[12] Explaining its disagreement with the Fourth Circuit's holding in *Hart*, the Ninth Circuit stated that "*Hart* was decided before *Renton*; therefore, *there may be some doubt* that it would survive scrutiny under the current Supreme Court's precedent. *We are sure*, however, that the case would not pass muster under our decisions." Pet. App. 20a (citing *Tollis* and *Acorn Invs., Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989)) (emphasis added).

SUMMARY OF ARGUMENT

1. This Court has consistently shown deference to the good faith efforts of municipalities to ameliorate the adverse secondary effects of adult businesses on neighborhoods through the use of the zoning power. There are two fundamental reasons for this deference. First, the Court has repeatedly interpreted the First Amendment to provide, with respect to adult business regulation, that "'society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.'" *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 n. 2 (1986) (citation omitted).

Second, because adult businesses are frequently creative and resourceful, the Court has deferred to state and local officials to devise appropriate means of addressing secondary effects. States and local governments, the Court has held, "'must be allowed a reasonable opportunity to experiment with solutions to [the] admittedly serious problems" posed to the quality of life in communities by adult businesses. *See id.*

[12] In this respect the court of appeals merely repeated history. In *Renton* the Ninth Circuit had struck down a municipal zoning ordinance regulating adult entertainment uses because of the city's failure to offer "evidence about the effects of adult theaters on Renton." 475 U.S. at 46. This judgment was, of course, reversed by this Court, which held that the Ninth Circuit had "imposed on the city an unnecessarily rigid burden of proof." *Id.* at 50.

at 52 (citation omitted). The Court has been particularly inclined to defer to local elected officials when the means chosen is zoning rather than a ban on speech or expression.

Consequently, the Court has declined to impose a strict evidentiary standard on municipalities called upon to defend zoning ordinances and other adult business regulations from the inevitable First Amendment challenges brought by adult businesses. "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52; *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (plurality opinion) (city could rely on other municipalities' evidence of secondary effects of adult theaters to support its regulation of nude dancing establishment).

The Ninth Circuit's analysis and holding are flatly contrary to this Court's precedents; indeed the court of appeals openly acknowledged this fact. *See* Pet. App. 20a (a multiple adult use prohibition upheld by another court of appeals that might be valid under *Renton* would surely be invalidated under the Ninth Circuit's more exacting standard). The court invalidated Los Angeles' 1983 clarification of its 1978 dispersal ordinance because the City did not provide specific evidence of the harmful secondary effects that resulted from the operation of combined bookstores/arcades. This is contrary both to the Court's tradition of deference to reasonable, good faith local solutions to the difficult problems posed by adult businesses, and to the evidentiary standard articulated in *Renton* and followed by the *Erie* plurality. The Ninth Circuit's judgment should therefore be reversed.

2. The evidentiary rule applied by the Ninth Circuit is erroneous because it requires that the citizenry experience the harmful secondary effects generated by adult businesses

before local elected officials can act to deal with them. It is thus contrary to a long line of this Court's cases, including First Amendment cases, that affirm the power of legislatures to base regulatory enactments on predictive judgments. *See, e.g., Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 212 (1997) (*Turner II*); *City of Erie*, 529 U.S. at 297-98 (plurality opinion). "A fundamental principle of legislation is that [the legislature] is under no obligation to wait until the entire harm occurs but may act to prevent it." *Turner II*, 520 U.S. at 212. The court below acknowledged this vital doctrine, *see* Pet. App. 14a (quoting *Jones Intercable, Inc. v. City of Chula Vista*, 80 F.3d 320, 326 (9th Cir. 1996)), only to ignore it.

The Los Angeles City Council is entitled to deference from the federal courts when it makes predictive judgments about the secondary effects of multiple adult uses. This is especially so where, as here, the City Council's judgment was supported not only by reason and common sense, but by a recent and detailed study of the impact of the concentration of adult businesses on the City's neighborhoods. The Ninth Circuit improperly substituted its views for the judgments of the City Council in a crucial area affecting the quality of urban life, and imperiously thrust aside "a valid governmental response to the 'admittedly serious problems' created" by the concentration of adult businesses. *See Renton*, 475 U.S. at 54 (citation omitted). Its judgment should therefore be reversed.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT REQUIRE STATES AND LOCAL GOVERNMENTS TO COMPILE EVIDENCE OF THE ADVERSE SECONDARY EFFECTS OF SPECIFIC ADULT BUSINESSES IN ORDER TO ENACT CONTENT-NEUTRAL ZONING ORDINANCES DESIGNED TO AMELIORATE SECONDARY EFFECTS

Zoning has fairly been described as "the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). As a result, when garden-variety zoning regulations are challenged in the courts, "deference should be given to governmental judgments concerning proper land-use allocation." *Id. See generally Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

State and municipal regulation of adult business, through zoning or other means, is inherently controversial because it is frequently impossible to satisfy all of the conflicting interests involved. The secondary effects that accompany sexually oriented businesses cause deep concern among the citizenry at large—and in the affected neighborhoods in particular—while States and municipalities must also respect the constitutional rights of the purveyors and consumers of these products.[13] For this reason, "[z]oning ordinances currently are the most popular form of regulation of adult entertainment," Jules B. Gerard, *Local Regulation of Adult Businesses: 2001 Edition* vi (2000), because they provide a

[13] As noted at 5-6 & n.6, *supra*, § 12.70.C was purposely crafted to be more protective of the ability of adult businesses to operate than the Detroit dispersal ordinance upon which it was modeled.

means of controlling secondary effects without interfering with the messages adult businesses convey.

At the same time, despite the Pavlovian prognostications of doom invariably raised by adult business owners in response to state or local regulation, *see, e.g.*, 10-11 & n.10, *supra* (Wiener testimony), "[t]he number of adult businesses and the quantity of adult entertainment on the market has increased explosively over the past three decades." Gerard, *Adult Businesses: 2001 Edition*, § 1.02, at 2. "Bookstores, television film rental outlets, and movie theaters" are now to be found "in virtually all communities." *Id.* at v.

Because adult entertainment establishments frequently have undesirable secondary effects on the surrounding neighborhoods, state, local, and federal officials throughout the country have, at the urging of citizens, taken measures to ameliorate those effects.[14] Given the variety and number of sexually oriented businesses, as well as differences in the configurations of municipalities, there is obviously no "one size fits all" solution to the problem of secondary effects of adult entertainment establishments.

Consequently, this Court has consistently shown deference to the good faith efforts of individual local governments to ameliorate this burgeoning but essentially insoluble problem. There are two principal reasons for this deference.

First, the Court has repeatedly interpreted the First Amendment to provide, in the context of adult business regulation, that "'society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.'" *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 n.2 (1986) (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50,

[14] *See, e.g.*, Ray Glier, *Gold Club Trial Set to Begin in Atlanta*, Washington Post, May 14, 2001, at A2 (describing federal criminal prosecution of adult entertainment establishment, with charges including prostitution, extortion, fraud, and racketeering).

70 (1976) (plurality opinion)); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion) ("nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection") (collecting cases).

Second, as the facts of this case suggest (*see* discussion at 10-11, *supra* (Wiener testimony), the owners and operators of adult businesses are creative and resourceful. The Court has accordingly deferred to state and local elected officials to devise constitutionally permissible—but effective—ways of addressing the secondary effects of sexually-oriented businesses, including crime and the blighting of neighborhoods. "As a majority of this Court recognized in [*Young*], 'a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect."'" *Renton*, 475 U.S. at 50 (quoting *Young*, 427 U.S. at 71, and *id.* at 80 (Powell, J., concurring)).

Thus, "[c]ities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. 'It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas.'" *Id.* at 52 (quoting *Young*, 427 U.S. at 71 (plurality opinion)). States and local governments, the Court has held, "'must be allowed a reasonable opportunity to experiment with solutions to [the] admittedly serious problems'" posed for communities by adult businesses. *Id.* (quoting *Young*, 427 U.S. at 71 (plurality opinion)). As zoning and licensing cases such as *Renton*, *Young*, and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), demonstrate, the Court has been most deferential to political decision-makers when regulations other than bans are employed.

This Court's willingness to defer to the decisions of local legislatures in the matter of the regulation of adult businesses—and its related unwillingness to obstruct good

faith efforts to regulate by the judicial imposition of onerous evidentiary burdens—is reflected in a long line of cases. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), which involved the related problem of a state prohibition of the public showing of obscene films, the Court dismissed the argument that the State had failed to offer adequate evidence to sustain its laws because, according to petitioner, "there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women." *Id.* at 60. To this the Court responded: "We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, except in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution." *Id.*

Five years later, in *Young*, the Court considered the validity of a city's decision to enact a dispersal ordinance to ameliorate the secondary effects of theaters "which exhibit sexually explicit 'adult' movies." 427 U.S. at 52. The Detroit Common Council had determined that the best way to balance the competing interests of theaters and their patrons, on the one hand, and the community at large, was to zone for the dispersal of adult theaters rather than allowing them to concentrate in particular neighborhoods.

The Detroit zoning ordinance, which served as a model for the Los Angeles zoning ordinance in this case, was adopted in 1972 in response to the increase in the number of adult theaters from two in 1967 to 25 in 1972. It provided that "an adult theater may not be located within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area."[15] 427 U.S. at 52 & n.2. The adult use ordinance was

[15] As discussed *supra* at 5 & n.6, however, "[d]ue to the predominance of commercial zoning in 'strips' along major and secondary streets" in Los Angeles, J.A. 40, the City did not adopt the Detroit ordinance wholesale. Instead, it tailored its ordinance to avoid "limit[ing] the potential locations for such businesses rather severely." *Id.*

supported by the Detroit Common Council's determination that "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime," *id.* at 71 n.34 (plurality opinion), and that such secondary effects "are not attributable to theaters showing other types of films." *Id.*

Although the Court's judgment upholding the ordinance was not supported by a single rationale, five Justices agreed that the Detroit dispersal ordinance was permissible under the First Amendment. *See id.* at 63-73 (plurality opinion); *id.* at 73-84 (Powell, J., concurring). Justice Stevens wrote an opinion for the four-Justice plurality in which he stated:

> It is not our function to appraise the wisdom of [the city council's] decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Id. at 71.

Ten years later the *Renton* Court revisited the issue of the constitutionality of a zoning ordinance creating dispersal rules for adult theaters.[16] But now the rationale for the judgment upholding the ordinance was expressed in a majority opinion on behalf of six Justices, who adopted much of the reasoning of the *Young* plurality.[17] The *Renton* Court took particular pains to reject the Ninth Circuit's view that the ordinance was invalid because it had been enacted "without the benefit of studies specifically relating to 'the particular problems or needs of Renton.'" 475 U.S. at 50 (quoting 748

[16] The Renton zoning ordinance "prohibit[ed] adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school." 475 U.S. at 43.

[17] An additional Justice concurred in the result. *See* 475 U.S. at 55 (Blackmun, J., concurring).

F.2d at 537). "We think," the Court said, "the Court of Appeals imposed on the city an unnecessarily rigid burden of proof." *Id.*

Renton had "relied heavily on the experience of, and studies produced by, the city of Seattle," where "the adult theater zoning ordinance was aimed at preventing the secondary effects caused *by the presence of even one such theater in a given neighborhood.*" *Id.* (emphasis added). In addition, the Court held, Renton had properly relied upon the opinion of the Washington Supreme Court upholding the Seattle adult use ordinance. *See id.* at 50-51 (citing and quoting *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153 (Wash. 1978)).

The *Renton* Court ruled that there was an adequate basis for the city's ordinance even though Renton had done no studies of its own. "The First Amendment," the Court reasoned, "does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52. The Court also reaffirmed the fundamental principle that the choice of method for addressing secondary effects lies first and foremost with state and local legislatures, not with the courts. "Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton." *Id.* at 52.

In *FW/PBS*, adult business owners challenged Dallas' licensing scheme for a wide range of "sexually oriented businesses." 493 U.S. at 220-21.[18] One provision of the

[18] The Dallas ordinance upheld in *FW/PBS*, like the Los Angeles ordinance challenged here, prohibited multiple adult uses in a single location. *See Randall v. City of Dallas*, 648 F. Supp. 1061, 1066 n.14 (N.D. Tex. 1986) ("there may not be more than one sexually oriented business 'in the same building, structure, or portion thereof'") (citing and quoting Dallas City Code § 41A-13(c)), *aff'd*, 837 F.2d 1298 (5th Cir. 1988), *aff'd in part and rev'd in part sub nom. FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

ordinance classified as "sexually oriented businesses" motels "that rent rooms for fewer than 10 hours." *Id.* at 236 (citing Dallas City Code § 41A-18(a)). The motel owners challenged this classification under the Due Process Clause, arguing that "the city had an insufficient factual basis on which to conclude that rental of motels for fewer than 10 hours produced adverse impacts." *Id.* They specifically asserted that "the council had before it only [the 1977 Los Angeles Study] that considered cursorily the effect of adult motels on surrounding neighborhoods." *Id.*

Although some portions of the *FW/PBS* decision commanded fewer than a majority of Justices, six members of the Court joined to reject this evidentiary argument. The Court based its holding largely on judicial notice and common sense. The court of appeals, this Court approvingly noted, had "thought it reasonable to believe that shorter rental time periods indicate that the motels foster prostitution and that this type of criminal activity is what the ordinance seeks to suppress." *Id.* (citing 837 F.2d at 1304). The Fifth Circuit therefore ruled that "no more extensive studies were required than those already available." *Id.*

This Court agreed with the Fifth Circuit's analysis, holding that "the reasonableness of the legislative judgment, combined with the Los Angeles study, is adequate to support the city's determination that motels permitting room rentals for fewer than 10 hours should be included within the licensing scheme." *Id. Cf. Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion) (upholding against a First Amendment challenge a state restriction on solicitation of votes on Election Day on basis of "[a] long history, a substantial consensus, and simple common sense").

Most recently, *City of Erie* upheld a municipal ban on total nudity in establishments offering live adult entertainment. Disagreeing with the dissenting Justices' view that the city ordinance constituted a "total ban," *see* 529 U.S. at 319 (Stevens, J., dissenting), the *Erie* plurality responded that the city had not sought to interfere with the dancers' expression. Rather, "[i]n trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and other deleterious effects caused by the presence of such an establishment in the neighborhood." 529 U.S. at 293. In response to the dissent's contention that requiring dancers to wear minimal covering was a "total ban" on expression, the plurality stated: "If States are to be able to regulate secondary effects, then [such] *de minimis* intrusions on expression . . . cannot be sufficient to render the ordinance content based." *Id.* at 294 (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).[19]

As for the evidentiary showing required to support the ordinance banning totally nude live entertainment, the *Erie* plurality relied upon the *Renton* standard. *See* 529 U.S. at 296. It concluded that "Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that *secondary effects are caused by the presence of even one adult entertainment establishment in a*

[19] The *Erie* plurality also rejected the respondent's suggestion that the ordinance was the product of an "illicit motive" on the part of the City Council. "As we have said before," Justice O'Connor wrote, "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." 529 U.S. at 292 (plurality) (citing *United States v. O'Brien*, 391 U.S. 367, 382-83 (1968)). *O'Brien* held that "'[t]he decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.'" 391 U.S. at 383 (quoting *McCray v. United States*, 195 U.S. 27, 56 (1904)).

given neighborhood." *Id.* at 297 (emphasis added). The *Erie* plurality thus applied a deferential evidentiary standard in finding reasonable Erie's reliance on evidence concerning the harmful secondary effects of adult movie theaters to support its determination to ban nude dancing in an adult bar.

As the foregoing cases make clear, the Ninth Circuit erred in imposing on Los Angeles an unnecessarily rigid evidentiary burden to support an ordinance that simply reaffirmed the City Council's then-recent prohibition of "multiple adult uses." *See* discussion *supra* at 6-10. The Ninth Circuit struck down the City's 1983 ordinance because of its failure to provide specific evidence of the harmful secondary effects of the operation of combined adult bookstores/video arcades. The court repeatedly expressed its view that the City's reliance on the 1977 Los Angeles Study, which supported the 1978 ordinance that was legislatively clarified in 1983, was insufficient. *See, e.g.*, Pet. App. 15a ("Like the County in *Tollis*" which presented no evidence of any kind, 827 F.2d at 1333, "Los Angeles has presented no evidence that a combination bookstore/arcade produces any of the harmful secondary effects identified in the [Los Angeles] Study.").[20]

The Ninth Circuit invalidated the City's zoning ordinance despite this Court's precedents that give state and local governments wide latitude in dealing with the difficult quality of life problems posed by adult businesses. It flouted the evidentiary rule announced in *Renton* and reaffirmed in subsequent cases, with which it expressly disagreed. *See* Pet.

[20] It is ironic that the Ninth Circuit deemed Los Angeles' reliance on its comprehensive study of the secondary effects of the concentration of adult businesses to be insufficient, when other courts, including this Court, have upheld adult business ordinances based in part upon this same 1977 Los Angeles Study. *See FW/PBS*, 493 U.S. at 236; *Buzzetti v. City of New York*, 140 F.3d 134, 136 (2d Cir.), *cert. denied*, 525 U.S. 924 (1998); *Excalibur Group, Inc. v. City of Minneapolis*, 116 F.3d 1216, 1218 n.2 (8th Cir. 1997), *cert. denied*, 522 U.S. 1077 (1998); *Hart*, 612 F.2d at 829 n.10.

App. 20a (stating that a North Carolina multiple use statute that might "survive scrutiny under the current Supreme Court's precedent" would surely "not pass muster under our decisions in *Tollis* and *Acorn*").

Finally the Ninth Circuit ruled against the City even in the face of the admission of the owner of Alameda and Highland that combining the sale of adult books and video arcades in a single location "significantly" increases profitability and economic viability of the establishment. *See* J.A. 230 (Wiener testimony). Wiener's self-described "expert" testimony, *see id.*, necessarily refers to the higher sales volume, traffic, and, inevitably, secondary effects, that result from combining adult uses in a single location. This "'total, under one roof' approach to the marketing of sexually explicit materials," *see Hart*, 612 F.2d at 828, would require cities to permit sexual department stores, with each floor dedicated to a separate adult use. *Cf.* Pet. App. 62a-64a (L.A.M.C. § 12.70.B) (identifying variety of separate adult uses under City Code).[21] In the short-run, of course, there would inevitably be an exponential growth in the number of combined bookstore/arcades in Los Angeles (and elsewhere), each one, according to Wiener's expert testimony, resulting in a significant increase in retail traffic. *See Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994); J.A. 8 (Declaration of G. Randall Garrou, Esq.) (plaintiffs in *Topanga* consisted of 22 adult businesses challenging the constitutionality of Los Angeles' multiple use ordinance); *see also id.* at 9 (refer-

[21] Having made the legislative determination to prohibit more than one adult use in a building, the Constitution does not require the City to draw lines among the number of permissible uses—to allow, for example, two uses, but to prohibit three or four. This is precisely the sort of line drawing that this Court has repeatedly recognized must be left to legislatures, not to courts. *See Renton*, 475 U.S. at 52 (citing *Young*, 427 U.S. at 71 (plurality opinion)).

encing additional adult businesses seeking to operate multiple uses in Los Angeles).

Under this Court's cases it is clear that Los Angeles acted constitutionally in enacting the 1983 clarifying ordinance based upon the 1977 Study. Because the Ninth Circuit imposed upon Los Angeles an unreasonable evidentiary burden for zoning of adult businesses that ignores the legal standards and reasoning of this Court, its judgment should be reversed.

II. UNLESS REVERSED, THE NINTH CIRCUIT'S HOLDING WILL REQUIRE THE CITIZENRY TO SUFFER THE SECONDARY EFFECTS OF ADULT BUSINESSES BEFORE GOVERNMENTAL ACTION CAN BE TAKEN, AND WILL PREVENT STATE AND LOCAL LEGISLATURES FROM ACTING ON THE BASIS OF REASONABLE PREDICTIVE JUDGMENTS

Unless reversed, the Ninth Circuit's evidentiary standard will inflict immediate harm on the citizens of Los Angeles, who will be subjected to the invidious secondary effects of adult businesses. Mr. Wiener, the experienced purveyor of sexually explicit books and videotapes, will meanwhile be spared the inconvenience and expense of opening separate retail premises for his adult bookstores and video arcades. *See* J.A. 20, 230.

Such a result is contrary to the First Amendment, which does not create a "right" to the most profitable means of operating an adult bookstore or arcade. As the Court put it in *Renton*, "we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." 475 U.S. at 54. "The question of purely economic injury is not relevant to the issue of whether a moving party faces hardship if a restrictive zoning ordinance is enforced." *Topanga Press*, 989 F.2d at

1528 (citing *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984)).

By requiring Los Angeles to proffer—in advance of enacting a zoning ordinance—highly specific evidence of the secondary effects that result from the precise adult business activity in question, the Ninth Circuit has disregarded settled First Amendment doctrine and denied the City "'a reasonable opportunity to experiment with solutions to admittedly serious problems.'" *Renton*, 475 U.S. at 52 (quoting *Young*, 427 U.S. at 71). It has admonished municipalities that the Constitution prohibits them from engaging in good faith regulation of adult businesses to ameliorate secondary effects unless and until municipal officials have documented the precise secondary effects that flow from the specific uses in question—in this case, the operation of an adult bookstore together with an adult video arcade.

The Ninth Circuit has, in short, held that the citizenry must first experience the harms before federal courts will permit reasonable ameliorative zoning. Not only is this flatly contrary to the Court's precedents concerning the regulation of adult business, discussed above, it is contrary to a long line of cases, including First Amendment cases, that affirm the power of legislatures to base regulatory enactments on predictive judgments. Ironically, even the court below acknowledged this rule of law, only to ignore it. The court expressly noted that under this Court's teachings as well as its own cases, courts are to "'"accord substantial deference to the predictive judgments'" of legislative bodies when analyzing content-neutral regulations that burden speech." Pet. App. 14a (quoting *Jones Intercable, Inc. v. City of Chula Vista*, 80 F.3d 320, 326 (9th Cir. 1996) (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (*Turner I*))).

The rationale for this rule is clear, compelling, and fully applicable to this case. "A fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it." *Turner*

Broadcasting System, Inc. v. FCC, 520 U.S. 180, 212 (1997) (*Turner II*). This principle is particularly applicable to content-neutral time, place, and manner regulations, which "do not pose the same 'inherent dangers to free expression' that content-based regulations do, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution." *Id.* at 213 (quoting *Turner I*, 512 U.S. at 661).

Just last term *City of Erie* applied these principles to uphold municipal regulation of a sexually oriented business. Justice O'Connor wrote for a four-Justice plurality that "[t]he city council members, familiar with commercial downtown Erie, are the individuals who would likely have had first-hand knowledge of what took place at and around nude dancing establishments in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects." 529 U.S. at 297-98 (plurality).[22] And, she continued, "[a]nalogizing to the administrative agency context, it is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such 'legislative facts' within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment." *Id.* at 298 (citations omitted).

The Los Angeles City Council, like the Erie City Council, is entitled to deference from the federal courts when it makes predictive judgments about secondary effects of multiple adult uses—all the more so when those predictive judgments are supported not only by reason and common sense, but by a recent and detailed study of the impact of adult businesses on

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[22] The preamble to the challenged adult business ordinance stated that "the Council of the City of Erie has, at various times over more than a century, expressed its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution, and other serious criminal activity." 529 U.S. at 297 (plurality).

the City. The clarifying ordinance struck down by the Ninth Circuit contains a lengthy statement of the City Council's rationale for its enactment, including "the adverse impacts which result from the continued concentration of adult entertainment business" and the Council's finding that "a number of instances in which two or more adult entertainment business[es] have been established or maintained at the same location . . . tends to have an adverse impact on the neighborhood in which they are located and is contrary to the dispersal approach taken by the City" in enacting §12.70 just a few years before. Pet. App. 74a-75a. Moreover, the City published a notice of public hearing, made its complete file on the proposed ordinance available for public inspection, and held a public hearing on the "proposed ordinance to amend the [City] Code by prohibiting the establishment of more than one adult entertainment business in the same building or structure." Excerpts of Record in Court of Appeals, No. 98-56200, Vol. 2, at 347-48.

The Ninth Circuit improperly substituted its views for those of the City Council, which had plainly engaged in a diligent, open, and good faith effort to ameliorate the secondary effects of the concentration of adult businesses resulting from multiple uses. The court below imperiously thrust aside "a valid governmental response to the 'admittedly serious problems'" created by concentrations of sexually oriented adult businesses, *Renton*, 475 U.S. at 54 (citation omitted), in open disregard of this Court's precedents and to the detriment of the citizens of Los Angeles who must live with the consequences. Unless reversed by this Court, its judgment will stand as a major obstacle to reasonable, good faith zoning of adult entertainment businesses.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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